IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 179

SANDRA ADICKES,

Petitioner,

against

S. H. KRESS AND COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent S. H. Kress and Company (hereinafter referred to as "Kress"), defendant below, opposes the granting of the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit on the grounds that the Petition fails to satisfy the requirements of Rule 19 of the Rules of this Court, and, further, fails to set forth any special, important or extraordinary grounds for the Court's exercise of its discretionary certiorari jurisdiction.

Opinions Below

On March 14, 1966, the United States District Court for the Southern District of New York, after the completion of full discovery, ordered summary judgment with respect to petitioner's claim that Kress had entered into a con-

spiracy to deprive petitioner, the plaintiff below, of her civil rights, finding that there was

> "no evidence in the complaint or in the affidavits and other papers from which a 'reasonably-minded person' might draw an inference of conspiracy."

The opinion (Honorable Dudley B. Bonsal, U. S. D. J.), reported in 252 F. Supp. 140 (S. D. N. Y. 1966), is contained in Appendix B.*

On February 15, 1967, the United States District Court for the Southern District of New York (Honorable Charles H. Tenney, U. S. D. J.) entered an order and judgment directing a verdict in favor of respondent on the ground that petitioner had failed to offer proof of a violation of the Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983.

On December 27, 1968, the United States Court of Appeals for the Second Circuit affirmed both decisions of the District Court, finding that

> (a) there had been no proof of a violation of Section 1983; and
>
> (b) the claim of conspiracy was unsupported by any facts tending "to suggest a conspiracy".

The opinion of the Court of Appeals is contained in Appendix B.

Jurisdiction

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals affirming the District Court's judgment dismissing the complaint; discretionary jurisdiction would be founded on 28 U. S. C. §1254(1).

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* References to the "Appendix" are to petitioner's Appendix submitted as part of the instant Petition.

Statutes and Rules Involved

The Statutes and Rules pertinent here are:

Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, 42 U. S. C. §1983;

Rule 56, Federal Rules of Civil Procedure;

Rules 13(b)(1) and 16 (a-b), Calendar Rules of the United States District Court for the Southern District of New York.

Questions Presented

Respondent submits that the Petition does not present any "special and important" question, or, indeed, any question of substance. This action was decided by the Courts below on the unique fact situation involved. The questions presented to the Court of Appeals were:

1. Whether the District Court properly exercised its discretion in granting summary judgment dismissing a claim of conspiracy where, after full discovery, petitioner produced no facts to support the claimed conspiracy and there was specific proof negating such a claim.

2. Whether the District Court correctly exercised its discretion in refusing to allow an amendment of the complaint to allege a claim under a statute, declared unconstitutional almost 90 years ago by this Court, where the statute had no applicability to the facts presented, irrespective of its constitutionality.

3. Whether in an action for damages, brought pursuant to 42 U. S. C. §1983, for failure to serve a person at a lunch counter, the District Court correctly ruled that there was no state action.*

* The phrase "state action" is used by the courts and in this brief as the equivalent of, and interchangeable with, "under color of state law." See *e.g.*, United States v. Classic, 313 U. S. 299 (1941).

sippi Code, §2046.5, of refusing service to whites in the company of Negroes"—this, said Judge Bonsal, "will satisfy the state action requirement of 42 U.S.C. §1983" (A. 183). Judge Bonsal's opinion sets out the further dictum that, as to the enforcement of the "custom," petitioner would have to show, in addition that respondent's store manager had knowledge of or was influenced by Mississippi Code §2046.5 [See Point I-*supra*] in ordering the waitress not to serve petitioner (A. 183).

Judge Bonsal's interpretation did violence to the language of §1983 which grants a cause of action to a person subjected to a deprivation of his rights "under color of any statute, ordinance, regulation, custom, *or* usage, of any state . . ." The statutory language clearly lends federal support to the individual's assertion of his constitutional rights against either state law *or* against custom that would deny him such rights. Judge Bonsal derived his interpretation by reference to the Civil Rights Act of 1964 which defines "custom or usage" as that "required or enforced by officials of the state" [42 U.S.C. §2000a(d)] (A. 182). The effect of this interpretation is to narrow and limit the right to a cause of action and to require proof that a custom of refusing service to whites in the company of Negroes—which, in expression of a state policy against the "mixing" of the races, might be universally followed in a state by its residents, citizens and inhabitants—must not only be followed but *enforced* by state officials. Judge Bonsal further suggested that the enforcement by state officials must be known to the charged violator before the violatee has a cause of action.

This Court in *Jones* v. *Mayer Co.*, 392 U.S. 409, 423 (ftnote) (1968), has recently underlined the distinction

intended by Congress as between "State or local law" and "custom or prejudice" as shown in the debate on the Civil Rights Act of 1866 (42 U.S.C. §1982).

Judge Waterman in his dissent in the court below consulted "The Reconstruction Amendments Debates" as republished by the Virginia Commission on Constitutional Government (1967) in seeking a contemporaneous interpretation and meaning for custom as it appeared in 42 U.S.C. §1983 in 1871 when the language became law; he concluded that the meaning expressed in Black's Law Dictionary 4th edition, 1951, would have been acceptable to that Congress (A. 213):

> "A usage or practice of the people which, by common adoption and acquiescence, and by long unvarying habit, has become compulsory, and has acquired the force of law with respect to the place or subject matter to which it relates."[6]

Judge Waterman further assailed the Bonsal logic which defines the custom as the refusal to serve whites in the company of Negroes. Such a "custom" could not obtain in a state so historically prejudiced against the acceptance of Negroes in public places in the company of whites that, until the Civil Rights Act of 1964, despite the language of the thirteenth, fourteenth and fifteenth amendments to the constitution, whites and blacks risked their very lives in any attempt to mingle (A. 214). Yet that refusal on August 14, 1964, was unequivocally an expression of the custom against public integration.[7]

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[6] Black's Law Dictionary, 461 (4th Ed. 1951) (A. 214).

[7] The subtlety of the discrimination in the case at bar was not overlooked by Judge Waterman who quoted Judge Fuld of the

The framers of §1983 must have had this very custom or usage in mind when the law was passed. It was well known that the white "trouble maker" who advocated the cause of the black was doubly suspect. In the period immediately preceding the 1871 legislation, custom, prejudice and law in the South imposed sanctions on the white person who was friendly to the Negro. Viz.:

> "The laws were particularly harsh on white persons who broke the prohibitions of the slave codes; the death penalty for whites was not infrequently the punishment for aiding a slave to rebel." Stampp: *The Era of Reconstruction,* p. 211.

> "Mr. President, the condition which the thirteenth Amendment imposed on the late insurrectionary State was one which demanded the serious consideration and attention of this government. The equality which by the thirteenth, fourteenth and fifteenth amendments has been attempted to be secured for the colored men, has not only subjected them to the operation of prejudices which had theretofore existed, but it has raised against them still stronger feelings in order to fight down the equality by which it is claimed they are to control the legislation of that section of the country. They were turned loose among those people weak ignorant and poor. Those among the white citizens

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Court of Appeals of N. Y. in *Holland* v. *Edwards,* 307 N.Y. 38, 45 (1954):

> "One intent on violating [laws prohibiting discrimination] cannot be expected to declare or announce his purpose. For more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subleties of conduct . . . play no small part'." (A. 216).

there who have sought to maintain the rights which you have thrown upon that class of people, have to endure every species of proscription, of opposition, and of vituperation in order to carry out the policy of Congress, in order to lift up and to uphold the rights which you have conferred upon that class. It is for that reason not only necessary for the freed man, but it is necessary for the white people of that section that there should be stringent and effective legislation on the part of Congress in regard to these measures of reconstruction." [Remarks of Senator Pool of N. Carolina in Cong. Globe 41st Cong. 2nd Sess. pp. 3611-3613 cited in appendix to *U.S.* v. *Price*, 383 U.S. 787, 808, 809 (1966).]

and again:

"A small part of that population, but the worst part of it, banded themselves into felonious conspiracies, which take advantage of the unsettled condition of Southern society to commit assassinations, mutilations and other crimes . . . The most intelligent and probable explanation of motives imputes to them a rancorous and implacable discontent on account of the political and civil rights conferred on colored people by the constitutional amendments. Their operations are, therefore, directed chiefly against blacks and against white people who by any means attract attention as earnest friends of the blacks.

"The aim appears to put them under fear so that they will be silent when free men should speak, . . . If their main inspiration is hostility to the rights given to the colored under the thirteenth, fourteenth and fifteenth amendments it would extend to all who should befriend them; . . ." [Remarks of Congress-

man Perry, 42nd Cong. 1st Sess. 1871, "The Reconstruction Amendments Debates." Virginia Commission on Constitutional Government (1967) p. 512.]

Testimony adduced at the trial supported a factual finding of a similar situation in Hattiesburg, Mississippi, in 1964.

The petitioner testified that she had familiarized herself with the custom and usage in Hattiesburg of the general white community toward the mixing of white and Negro persons in groups; that she had had conversations with others about it and had concluded that it was the custom and usage not to serve white persons in public in the company of Negroes (A. 257); that she had observed that there was a policy in Mississippi of "opposition to the mixing of races" and the attitude of the community toward persons who "mix with Negroes" is hostile—all of which policy she had personally observed and experienced (A. 301, 302).

Another witness for the petitioner, Jimella Stokes, testified that she knew of acts of violence in Hattiesburg where white civil rights workers were attacked and beaten and that a large part of the violence "was directed towards the white civil rights workers in town in the company of Negroes" (A. 282).

Nonetheless, the majority opinion in the court below adopted the Bonsal test and required the petitioner to prove:[8]

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[8] The court below further stated that §1983 "required that the discriminatory custom or usage be proved to exist in the locale

1.) "a custom [described in 2 below] was enforced by the State of Mississippi pursuant to Mississippi Code Section 2046.5, a criminal trespass statute."[9]

2.) "a custom . . . of refusing service in restaurants to whites in the company of Negroes" (A. 204-206).

The court below disregarded the uncontroverted state of the record that there was testimony by the plaintiff and another witness as to its point (1) and that the court could take judicial notice of the existence of laws on the Mississippi statute books as to its point (2). Instead, it chose to disregard the testimony of the plaintiff because she "had never been in the State of Mississippi prior to June, 1964, and had never visited Hattiesburg until July of the year" (A. 205).

The plaintiff's testimony as to the custom against the public association of the races in Mississippi is underscored in contemporary literature in J. Silver, *Mississippi: The Closed Society* (1964), and in roughly contemporaneous decisions in this Court and lower federal courts. *United States* v. *Price*, 383 U.S. 787 (1966) (*Punishment and murder of civil rights workers by conspiracy of State official and private persons*); *Achtenberg, Adickes* v. *Mississippi*, 393 F. 2d 468 (C.A. 5, 1968) (*Same facts as case at bar—library and lunch counter discrimination*); *United*

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where the discrimination took place and in the State generally" (A. 205). While this may not be an actual requirement of this statute [see Judge Waterman's dissent (A. 271)], it is not difficult of proof by reference to the records in the federal court system—see cases cited pp. 35-36 of this brief.

[9] Neither the court below nor the trial Judge Tenney reached the issue also posed by Judge Bonsal that the store manager knew of and acted pursuant to §2046.5.

States v. *Richberg,* 398 F. 2d 523 (C.A. 5, 1968) (*Cafe discrimination*); *N.A.A.C.P.* v. *Thompson,* 357 F. 2d 831 (C.A. 5, 1966) cert. den. 385 U.S. 820 (1966) (*Protest against racial discrimination generally in Jackson*); *Dilworth* v. *Riner,* 343 F. 2d 226 (C.A. 5, 1965) (*Restaurant discrimination*); *Meredith* v. *Fair,* 298 F. 2d 696 (C.A. 5, 1962) (*Segregation in schools and colleges*); *United States* v. *Harpole,* 263 F. 2d 71 (C.A. 5, 1959) (*Jury exclusion*).

Respondent discriminated against petitioner twelve days after the effective date of Congress' 1964 Civil Rights Bill which stated:

> "All persons shall be entitled to the full enjoyment of the goods, services, facilities, privileges, advantages and accommodations, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin" [42 U.S.C. 2000a, Publ. L. 88-352 Title II §201 July 2, 1964, 78 Stat. 243].

The courts below evidently chose to disregard the reaffirmation in the 1964 Act of Congress' intention to eliminate race segregation in public places—"to obliterate the effect of a distressing chapter of our history." *Hamm* v. *Rock Hill,* 379 U.S. 306, 316 (1964).

POINT III

The pre-trial ruling barring petitioner from amending her complaint to assert statutory damages under the Civil Rights Act of 1875 was reversible error.

In 1875 Congress passed a public accommodations law which provided:

> "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law:
>
> Therefore,
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> "Sec. 1.) That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition or servitude."
>
> "Sec. 2.) That any person who shall violate the foregoing section by denying to any citizen, except for

reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided,* That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further,* That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively." Act of March 1, 1875, ch. 114, 18 Stat. 335.

In 1883 this Court, per Justice Bradley, declared this law to be unconstitutional on the grounds that private discrimination on account of race is not a proper subject for federal legislation since it is not affected with "State action," the *Civil Rights Cases,* 109 U.S. 3, 13, Justice Harlan dissented in an extensive opinion; reviewing the history of slavery in the United States, he showed that,

prior to the Civil War, and the Emancipation Proclamation, the rule of slavery had been affirmatively enforced by the federal court system. Viz.: *Prigg* v. *Commonwealth of Pennsylvania,* 16 Pet. 539 (1842); cf. *Dred Scott* v. *Sanford,* 19 How. 399 (1856). The thirteenth, fourteenth and fifteenth amendments, Justice Harlan concluded, now required affirmative action by the federal government to enforce their provisions and to undo the history of federal action in support of slavery.

Justice Bradley conceded that Congress had plenary legislative power over matters concerning "commerce" but dismissed that source of power as affecting the Civil Rights Act.

In *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964) and *Katzenbach* v. *McClung,* 379 U.S. 294 (1964), this Court upheld the constitutionality of the 1964 Civil Rights Act (42 U.S.C. 2000 *et seq.*)—the majority opinion, of Justice Clark, relying on the commerce clause and distinguishing the Civil Rights Cases on the grounds that the nineteenth century legislation did not limit the categories of affected businesses to those impinging on interstate commerce. The opinions declared further that the increase in population, technology and mobility since 1883 have changed the state of commerce so that discriminatory practices today make "a far larger impact upon the Nation's commerce than such practices had on the economy of another day" [*Heart of Atlanta, supra* p. 251].

Petitioner contends here that the Civil Rights Act of 1875 is still the law and that it gave her a valid cause of action to sue for damages in a mandatory sum of $500.00 for the discrimination practiced against her. An

extensive argument for the validity of this position is found in Nimmer, "A Proposal for Judicial Validation of a Previously Unconstitutional Law: The Civil Rights Act of 1875," 65 Cal. L.R. 1394 (1965).

Certainly there has been a change in judicial thinking since the majority spoke for this Court in 1883—since the majority ruled in *Plessy* v. *Ferguson*, 163 U.S. 537, in 1896. See A. Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers L.R. 387 (1967).

In *Brown* v. *Board of Education, supra,* this Court consulted contemporary congressional debate and the circumstances surrounding the adoption of the fourteenth amendment in 1868 and concluded that "although these sources cast some light, it is not enough to resolve the problem with which we are faced." Reference to Reconstruction history and the Act of 1875 finds extensive debate, commencing in 1871, on the role of the federal government that was to evaluate in the passage of the Act of 1875 in securing and protecting the civil rights of individuals. The force of this Act was limited to the rights of the individual to public accommodations—but only after the Act had lost specific provisions as to equality in education and jury selection. See "The Reconstruction Amendments Debates", *supra* pp. 654-6, 657-661, 663, 671, 736-7, 740-3. Cf. A. Avins, "The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations," 66 Col. L.R. 873 (1966).

In the light of this history, it is ironic that Judge Bonsal, today, should supply a gloss to the Act of 1875 distinguishing the respondent's lunch counter from an "inn" and, on this narrow ground, should deny petitioner's motion to add a third cause of action to her complaint.

As to the definition of an "inn", Justice Harlan in his Civil Rights Case dissent stated:

"The word 'inn' has a technical legal signification. It means, in the act of 1875, just what it meant at common law. A mere private boarding-house is not an inn, nor is its keeper subject to the responsibilities, or entitled to the privileges of a common innkeeper. 'To constitute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travellers or wayfarers who might choose to accept the same, being of good character or conduct.' Redfield on Carriers, etc., §575. Says Judge Story:

'An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants. An innkeeper is bound to take in all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence . . . If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. . . . They (carriers of passengers) are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accommodations to a guest.' Story on Bailments, §§475-6.

"In *Rex* v. *Ivens*, 7 Carrington & Payne, 213, 32 E.C.L. 495, the court, speaking by Mr. Justice Coleridge, said:

'An indictment lies against an innkeeper who refuses to receive a guest, he having at the time room

in his house; and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender. This law is founded in good sense. The innkeeper is not to select his guests. He has no right to say to one, you shall come to my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them with what they want.'

"These authorities are sufficient to show that a keeper of an inn is in the exercise of a quasi public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or color of that person." [10]

Reference to the common law duty of the innkeeper to serve all without racial distinction is reaffirmed as predating the thirteenth amendment was made by this Court in *Heart of Atlanta, supra* p. 261.

Petitioner maintains that a reading of the preamble of the Civil Rights Act of 1875 in conjunction with the specific language of the Act would bring the respondent establishment under its terms—as either an "inn" or a place

[10] The public nature of the innkeeper and/or victualler's duty refers back to Point II, *supra,* and the common law duty that Mississippi Code §2046.5 changed.

of "public amusement" both of which are covered by language in the statute.

In this connection, incidentally, Nimmer expresses the misgivings that courts today might be inclined to distinguish lunch counters, shoppers' luncheon booths and restaurants as we know them from an "inn" as designated in the Act of 1875. Judge Bonsal below fully justifies this misgiving by making just such a distinction in refusing the plaintiff the right to sue under the Act of 1875, in an opinion that otherwise over-rides Nimmer's useful historical review (A. 185).

This limitation on the 1875 Act would not seem to be consistent with its purpose nor with a reasonable construction in the light of the nature of a luncheon service attached to a store where, according to stipulated fact, a part of its products travelled in interstate commerce (A. 192). Cf. *Williams* v. *Howard Johnson's Restaurants*, 268 F. 2d 845 (CA 4, 1959) (before passage of the 1964 Civil Rights Act).

In addition to her right under 42 U.S.C. §1983, petitioner had an independent right to assert a claim for liquidated damages under the 1875 Act.

POINT IV

Judge Bonsal's summary judgment on the basis of affidavits and unsworn statements against petitioner's conspiracy count, which was supported by circumstantial evidence, denied petitioner the right of trial on this issue.

Judge Bonsal set up trial standards rather than the appropriate pleading standards when he dismissed on summary judgment the conspiracy count in which petitioner alleged that the respondent Kress had engaged in conspiracy with the police department of Hattiesburg.

In support of its motion respondent relied upon the denials by the manager in his deposition and by two members of the police force and of the Chief of Police in their affidavits. Respondent, however, offered two unsworn statements of its employees which did not corroborate and were in apparent contradiction of the respondent's denial and of the testimony set forth in the deposition and affidavits of respondent's other witnesses. Dolores Freeman, the waitress who refused service to petitioner does not refer to any "explosive" situation and explained her refusal as merely in compliance with policy set by her supervisor (A. 178). Irene Sullivan, another employee of respondent, stated that Patrolman Hillman entered the store after petitioner and her students had come into the store and that she (Miss Sullivan) spoke to him (A. 179). Hillman was the officer who arrested petitioner immediately upon her departure from the store.

The facts of any such conspiracy are peculiarly within the knowledge of the respondent. Petitioner should have

had the opportunity at trial to draw out such facts from the respondent and to make use of the factual inferences surrounding the events of her first being discriminated against by respondent and then, immediately thereafter, being arrested by the police. See *Poller* v. *Columbia Broadcasting Co.*, 368 U.S. 464 (1962).

Respondent should not have been permitted to rely upon the *ex parte* affidavits of the police officers and Chief of Police; this action by the trial court deprived plaintiff of the right of cross-examination. As this Court said in reversing a summary judgment in *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944):

> "It may well be that the weight of the evidence would be found on a trial to be with the defendant. But it may not withdraw these witnesses from cross-examination, the best method yet devised for testing trustworthiness of testimony. And their credibility and the weight given to their opinions is to be determined after trial, in the regular manner."

See *Arnstein* v. *Porter*, 154 F. 2d 464 (CA 2, 1946); *Colby* v. *Klune*, 178 F. 2d 872 (CA 2, 1949).

Petitioner maintains that the conspiracy between respondent and the police department can, without more, be inferred from the sequence of events. As to such contention, this Court has stated:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962).

To the same effect is *Poller* v. *Columbia Broadcasting Co.*, 368 U.S. 464 (1962).

Judge Bonsal placed great reliance on *Morgan* v. *Sylvester*, 125 F. Supp. 380 (S.D.N.Y. 1954) affd. 220 F. 2d 758 (CA 2, 1955) cert. den. 350 U.S. 867 (1955) (A. 183). There a summary judgment was granted and affirmed in an action by a plaintiff under the Civil Rights Act (Title 42 U.S.C. §§1983, 1985) against various judicial, executive, and legislative officials of the State of New York. That summary judgment was predicated on the immunity accorded under the law to public officials acting in the course of their official duties and further upon the ground that there was no issue of genuine fact—no plausible ground for the maintenance of the cause of action alleged in plaintiff's complaint.

Morgan was not a case, as is the case at bar, where one unlawful act followed upon another—police action discriminating against petitioner and group at the library, respondent's act of discrimination against petitioner, and this act followed immediately by the illegal arrest of petitioner on the trumped-up charge of vagrancy.

The finding by the trial court in the present case that the refusal of service was not based upon race and was not "conspiratorial" is predicated exclusively on the self-serving statements of store manager Powell. It ignores petitioner's testimony that she was told by the waitress she was not being served because she was in the company of Negroes. Moreover, it callously accepts respondent's allegation that the situation was "explosive," as justification for respondent's invasion of the petitioner's civil rights and for the subsequent police action against the petitioner.

Such inverted reasoning—historically invoked again and again to justify deprivation of personal liberty by "protective custody"—cannot be appropriately invoked here. The facts before the trial court—supplied by the respondent as well as by the petitioner—warranted a trial of petitioner's allegation of conspiracy against her civil rights.

This Court has repeatedly held that, on appeal from a grant of summary judgment, factual disputes must be resolved in a manner most favorable to the party opposing the motion and this is particularly true with regard to the invocation of rights under the federally created civil rights statutes. Cf. *Jobson* v. *Henne*, 355 F. 2d 129 (CA 2, 1966).

POINT V

It was error and an abuse of discretion by the trial court to deny petitioner the benefit of expert testimony on the issue of custom and usage when the testimony of experts was contemplated in the pre-trial order and due notice of their identity was promptly given one day before trial.

One day before trial, petitioner gave notice orally and in writing of her intention to call two expert witnesses to the custom and usage in Mississippi on the issue of the "mixing" of the races in public places (A. 227). She also filed a written amendment to the trial memorandum (this brief p. 10).

The pre-trial order specified that no more than two expert witnesses would be called by either side and that prompt notice of their identity would be given (A. 195).

Petitioner maintains that she was unable to ascertain who would be available until she knew certainly when the

case was to be tried, and petitioner's counsel protested her diligence in going about finding the appropriate expert from the moment the case was definitely set for trial. The names of the witnesses—Reverend Robert Beech and Andrew Gordon—were known to the respondent the day before the case was to go to trial (A. 229, 230).

Although the trial court considered the main issue in the case to be that on which these experts were to testify and subsequently non-suited the petitioner for insufficient proof on this issue, the trial court nonetheless ruled against permitting them to testify (A. 233).

Before petitioner rested, she reapplied to the court for permission to call one of the experts and made an offer of proof (A. 303, 304). Permission to call the witness, Andrew Gordon, was again denied (A. 305).

It is petitioner's contention here that expert evidence would have strengthened her case if it had been permitted to go to the jury and, accordingly, it was an abuse of discretion for the court not to permit the expert testimony. As it was, the trial court through the testimony of the petitioner and other witnesses to the events admitted evidence bearing on the customs against the "mixing" of the races in Hattiesburg, Mississippi, in 1964. Nonetheless, the trial court disregarded this evidence as it applied to the issues and as they should have been joined (see Point I and Point II of this brief).

This refusal of the trial court to receive expert testimony on the issue as erroneously framed—i.e.: whether in Hattiesburg in 1964 it was "the custom" to serve Negroes and refuse service to whites in their company—compounded the error and underlined the unfairness of the proceeding

as to petitioner. Apropos of this kind of judicial conduct as constituting an abuse of discretion the Court of Appeals for the Sixth Circuit has said in *Cohen* v. *Young*, 127 F. 2d 719, 726 (1942):

> "The term 'discretion' implied the absence of a hard and fast rule. The establishment of a clearly defined rule of action would be the end of *discretion* and yet discretion should not be a word for arbitrary will or inconsiderate action. 'Discretion means the equitable decision of what is just and proper under the circumstances.'"
>
> "Whether action taken by the court lies within its sound discretion is ordinarily a question of fact whether under the rules of law and the established principles of practice, having regard to the rights and interests of all parties, justice and equity require the action in question. *Langnes* v. *Green*, 282 U.S. 531, 51 S. Ct. 243, 75 L. Ed. 520. The exercise of discretion does not permit the court to disregard the substantive principles of law established for the protection of litigants. One of these principles is that judgments and decrees which make findings of fact shall be founded on evidence. Thus it is an abuse of discretion to refuse to receive and consider evidence by which the court's discretion should be guided or controlled. *Goodyear Tire & Rubber Co.* v. *National Labor Relations Board*, 6 Cir., 122 F. 2d 450, 453, 136 A.L.R. 883; *Commonwealth* v. *White*, 147 Mass. 76, 78, 16 N.E. 707."

Cf. *Springfield Crusher, Inc.* v. *Transcontinental Insurance Co.*, 372 F. 2d 125 (CA 3, 1967).

CONCLUSION

The judgment of the court below should be reversed and the case remanded to the District Court under appropriate instructions permitting petitioner to sue for damages under 42 U.S.C. §1983 and the Civil Rights Act of 1875.

Respectfully submitted,

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TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF UNITED STATES

AMENDMENT XIII.

§ 1. SLAVERY ABOLISHED

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. ENFORCEMENT

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

§ 1. CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Sections 2-4 omitted)

§ 5. Power to Enforce Article

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.

§ 1. Right to Vote Not to Be Abridged

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

§ 2. Power to Enforce Article

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

STATUTES

42 U.S.C. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress. R.S. §1979. Act Apr. 20, 1871, c. 22. §1, 17 Stat. 13.

Civil Rights Act of 1875

Chap. 114—An Act to protect all citizens in their civil and legal rights.

Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law. Therefore,

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less

than thirty days nor more than one year: Provided, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: And provided further, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

Sec. 3. That the district and circuit courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the territorial, district, or circuit courts of the United States wherever the defendant may be found, without regard to the other party; and the district attorneys, marshals, and deputy marshals of the United States, and commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting and imprisoning or bailing offenders against the laws of the United States, are hereby specially authorized and required to institute proceedings against every person who shall violate the provisions of this act, and cause him to be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States, or territorial court, as by law has cognizance of the offense, except in respect of the right of action accruing to the person aggrieved; and such district at-

torneys shall cause such proceedings to be prosecuted to their termination as in other cases: Provided, That nothing contained in this section shall be construed to deny or defeat any right of civil action accruing to any person, whether by reason of this act or otherwise; and any district attorney who shall willfully fail to institute and prosecute the proceedings herein required, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action of debt, with full costs, and shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not less than one thousand nor more than five thousand dollars: And provided further, That a judgment for the penalty in favor of the party aggrieved against any such district attorney, or a judgment upon an indictment against any such district attorney, shall be a bar to either prosecution respectively.

Sec. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of misdemeanor, and be fined not more than five thousand dollars.

Sec. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States,

without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court.

Approved, March 1, 1875. [43rd Cong. Sess. II, pp. 335 et seq.]

GENERAL LAWS OF MISSISSIPPI—1956

Chapter 466—Senate Concurrent Resolution No. 125

A CONCURRENT RESOLUTION condemning and protesting the usurpation and encroachment on the reserved powers of the states by the Supreme Court of the United States and declaring that its decisions of May 17, 1954, and May 31, 1955, and all similar decisions are in violation of the Constitution of the United States and the State of Mississippi, and are therefore unconstitutional and of no lawful effect within the territorial limits of the State of Mississippi; declaring that a contest of powers has arisen between the State of Mississippi and said Supreme Court and invoking the historic doctrine of interposition to protect the sovereignty of this and the other states of the Union; and calling on our sister states and the Congress for redress of grievances as provided by law; and for other purposes.

Be it Resolved by the Senate of the State of Mississppi, the House of Representatives concurring therein, That the Legislature of Mississippi unequivocally expresses a firm determination to maintain and defend the Constitution of the United States, and the Constitution of this State, against every attempt, whether foreign or domestic, to undermine and destroy the fundamental principles embodied in our basic law by which this government was established, and by which the liberty of the people and

the sovereignty of the States, in their proper spheres, have been long protected and guaranteed;

That the Legislature of Mississippi explicitly and peremptorily declares and maintains that the powers of the Federal Government emanate solely from the compact, to which the States are principals, as limited by the plain sense and long recognized intention of the instrument creating that compact;

That the Legislature of Mississippi firmly asserts that the powers of the Federal Government are limited, and valid only to the extent that these powers have been conferred as enumerated in the compact to which the various states assented originally and to which the states have consented in subsequent amendments validly ratified;

That the inherent nature of this basic compact, apparent upon its face, is that the ratifying states, parties thereto, have agreed voluntarily to confer certain of their sovereign rights, but only specific sovereign rights, to a Federal Government thus constituted; and that all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, have been reserved to the states respectively, or to the people;

That the State of Mississippi has at no time, through the Fourteenth Amendment to the Constitution of the United States, or in any manner whatsoever, delegated to the Federal Government its right to educate and nurture its youth and its power and right of control over its schools, colleges, educational and other public institutions and facilities, and to prescribe the rules, regulations and conditions under which they shall be conducted;

That the aggrandizement of powers by the Federal Government has grown far beyond that ever conceived by the

authors of our Constitution, that the seizure and concentration therein of powers not granted by the compact under which the several states entered this Union, and particularly that by which Mississippi entered the Union on December 10, 1817, threaten to reduce these sovereign states to mere satellites, and to subject us to the tyranny of centralized government, so rightfully abhorred by the founders, and for the prevention of which they exercised their finest genius;

That in late years the encroachment upon the reserved rights of the States and of the people has grown apace, and the proponents of the acts of encroachment have grown so emboldened that not one of the sister states and its people have escaped the oppressive hand thereof: In the destruction of their vested property rights; abridgments of their liberties; control of their institutions, habits, manners and morals by centralized bureaucratic instrumentalities; and in fact by various wrongful and obtrusive acts, too numerous to be here documented, but so consistently characterized by an oppressive course of action so as to seriously threaten to completely destroy our constitutional processes and substitute in lieu thereof ideologies foreign to the soil of our beloved land;

That one of the noblest characteristics of our people is the reverent respect for an obedience to the courts of law and justice, and that which more than any other has ennobled our institutions of government, and ought to be challenged only with the most dreadful reluctance, still it should be solemnly and firmly declared that the hand of tyranny ought to be stayed from whatsoever source it might strike;

That we profess an undying attachment to and a warm regard and respect for the sister states, and for this Union, which, through unwarranted and unconstitutional action of the Supreme Court, is fastly being dissolved by usurpation of powers reserved to the states and transferring them to an all-powerful centralized government which, unless halted, will reduce the state to impotent vassals, sheared of all rights and powers except those received at the sufferance of the Federal Government;

That a question of contested power has arisen; the Supreme Court of the United States asserts, for its part, that the states did in fact prohibit unto themselves the power to maintain racially separate public institutions, and the State of Mississippi, for its part, asserts that it and its sister states have never delegated such rights;

That the flagrant assertion upon the part of the Supreme Court of the United States, accompanied by threats of coercion and compulsion against the sovereign states of this attempt by the court to usurp the exercise of powers not granted to it;

That the Legislature of Mississippi asserts that whenever the Federal Government attempts to engage in the deliberate, palpable and dangerous exercise of powers not granted to it, the states who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights and liberties appertaining to them;

That failure on the part of this state thus to assert its clear rights would be construed as acquiescence in the surrender thereof, and that such submissive acquiescence

to the seizure of one right would in the end lead to the surrender of all rights, and inevitably to the consolidation of the states into one sovereignty, contrary to the sacred compact by which this Union of States was created;

That the question of contested power asserted in this resolution is not within the province of the court to determine because the court itself seeks to usurp the powers which have been reserved to the states, and, therefore, under these circumstances, the judgment of all of the parties to the compact must be sought to resolve the question; that the Supreme Court is not a party to this compact, but a creature of the compact, and the question of contested power cannot be settled by the creature seeking to usurp the power, but by the parties to the compact who are the people of the respective states in whom ultimate sovereignty finally reposes. BE IT FURTHER RESOLVED THAT:

In order that relief be obtained and the wrongs and injuries inflicted be alleviated, we invite all of our sister states to join in taking such steps as are necessary to settle the grave question of contested sovereignty herein raised; the State of Mississippi declares that the Congress has the duty and authority to protect the rights of the states from the unwarranted encroachment upon their reserved powers to govern the internal and domestic affairs of the states; the State of Mississippi further asserts that the Congress has, on many occasions in the past, curbed the attempted encroachment by the judiciary upon the legislative and executive branches of government, and it is the responsibility of the Congress likewise to protect the states when their constitutional rights and privileges are endangered;

The State of Mississippi declares emphatically that the sovereign states of the Nation have never surrendered

their rights and powers to control their public schools, colleges and other public institutions; therefore, when an attempt is made to usurp these powers, the people of Mississippi object and refuse to be so deprived, reminding the Congress that the preservation of this Union of States, as the compact intended it should be, depends upon the preservation of the sovereignty of the states;

The compact intended ours to be a government of the people, for the people and, above all, a government by the people; if the right to govern and control the local affairs to decide questions of public health, morals, education and safety are taken from the states, then a fatal blow has been dealt state sovereignty and the states are nothing more than vassal provinces, subject to a central government;

The State of Mississippi declares that it is the duty and privilege of a state to object to the aforesaid invasion of its rights and does hereby interpose its sovereignty to protect these rights; it is the duty of the Congress to halt such practices and save these rights; and if such cannot be obtained other than by amendment to the Federal Constitution, we appeal to the Congress, in the exercise of the power granted under Article 5 of the Constitution, to initiate and submit an appropriate amendment direct to the forty-eight states for ratification by three fourths (¾) of the Legislatures thereof, declaring that the states have never surrendered their rights and powers to control their public schools, colleges and other public institutions and facilities to the Federal Government, or any department or agency thereof, but such powers are reserved to the states; and until such time as these wrongs are righted, we do hereby declare the decisions and order of the Su-

preme Court of the United States of May 17, 1954, and May 31, 1955, to be a usurpation of power reserved to the several states and do declare, as a matter of right, that said decisions are in violation of the Constitutions of the United States and the State of Mississippi, and therefore, are considered unconstitutional, invalid and of no lawful effect within the confines of the State of Mississippi;

We declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to void this illegal encroachment upon our rights, and we do hereby urge our sister states to take prompt and deliberate action to check further encroachment by the Federal Government, through judicial legislation, upon the reserved powers of all states.

The Governor of Mississippi is respectfully requested to transmit a copy of this resolution to the President of the United States, the Governor of each of the other states, and to the members of Congress and the Supreme Court of the United States.

Adopted by the Senate, February 29, 1956.

Adopted by the House of Representatives, February 29, 1956.

MISSISSIPPI CODE, SECTION 2046.5 (1956)

Business customers, patrons or clients—right to choose—penalty for violation.

1. Every person, firm or corporation engaged in public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty par-

lors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve; provided, however, the provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.

2. Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that "the management reserves the right to refuse to sell to, wait upon or serve any person," however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this act.

3. Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dolalrs ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

4. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any rea-

son, such holding of unconstitutionality shall not affect any other portion of this act.

MISSISSIPPI CODE, SECTION 2056(7) (1954)

Conspiracy.

If two (2) or more persons conspire

* * * * *

(7) To overthrow or violate the segregation laws of this state through force, violence, threats, intimidation, or otherwise;

* * * * *

such persons, and each of them, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than twenty-five dollars ($25.00), or shall be imprisoned not less than one month or more than six (6) months, or both.

MISSISSIPPI CODE, SECTION 4065.3 (1956)

Compliance with the principles of segregation of the races.

1. That the entire executive branch of the government of the State of Mississippi, and of its subdivisions, and all persons responsible thereto, including the governor, the lieutenant governor, the heads of state departments, sheriffs, boards of supervisors, constables, mayors, boards of aldermen and other governing officials of municipalities by whatever name known, chiefs of police, policemen, highway patrolmen, all boards of county superintendents of education and all other persons falling within the executive branch of said state and local government in the State of Mississippi, whether specifically named herein or not, as opposed and distinguished from members of the legislature and judicial branches of the government of said state, be

and they and each of them, in their official capacity are hereby required, and they and each of them shall give full force and effect in the performance of their official and political duties, to the Resolution of Interposition, Senate Concurrent Resolution No. 125, adopted by the Legislature of the State of Mississippi on the 29th day of February, 1956, which Resolution of Interposition was adopted by virtue of and under authority of the reserved rights of the State of Mississippi, as guaranteed by the Tenth Amendment to the Constitution of the United States; and all of said members of the executive branch be and they are hereby directed to comply fully with the Constitution of the State of Mississippi, the Statutes of the State of Mississippi, and said Resolution of Interposition, and are further directed and required to prohibit, by any lawful, peaceful and constitutional means, the implementation of or the compliance with the Integration Decisions of the United States Supreme Court of May 17, 1954 (347 U.S. 483, 74 S. Ct. 686, 98 L. ed. 873) and of May 31, 1955 (349 U.S. 294, 75 S. Ct. 753, 99 L. ed. 1083), and to prohibit by any lawful, peaceful and constitutional means, the causing of a mixing or integration of the white and Negro races in public schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state, by any branch of the federal government, any commission, board or agency of the federal government, or any subdivision of the federal government, and to prohibit, by any lawful, peaceful and constitutional means, the implementation of any orders, rules or regulations of any board, commission or agency of the federal government, based on the supposed authority of said Integration Decisions, to cause a mixing or integration of the white and Negro races in public

schools, public parks, public waiting rooms, public places of amusement, recreation or assembly in this state.

2. The prohibitions and mandates of this act are directed to the aforesaid executive branch of the government of the State of Mississippi, all aforesaid subdivisions, boards, and all individuals thereof in their official capacity only. Compliance with said prohibitions and mandates of this act by all of aforesaid executive officials shall be and is a full and complete defense to any suit whatsoever in law or equity, or of a civil or criminal nature which may hereafter be brought against the aforesaid executive officers, officials, agents or employees of the executive branch of State Government of Mississippi by any person, real or corporate, State of Mississippi or any other state or by the federal government of the United States, any commission, agency, subdivision or employee thereof.